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In the Matter of)	
)	
Merger of)	
Qwest Communications)	CC Docket No. 99-272
International, Inc., and)	
U S WEST, Inc.)	
)	
Applications for Transfer of Control)	
)	

Victoria T. Aguilar
Senior Director
Regulatory and Government Affairs
FirstWorld Communications, Inc.
8390 East Crescent Parkway, Suite 300
Greenwood Village, CO 80111

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TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	THE PROPOSED MERGER DOES NOTHING TO BENEFIT CURRENT USWC CUSTOMERS AND DOES NOT PROVIDE A PUBLIC INTEREST BENEFIT	4
A.	The Merger Of Qwest And USWC Reduces The Amount Of Potential Competition In The USWC Region.....	4
B.	The Applicants Have A Poor Record Of Compliance With The Letter And Spirit Of The 1996 Act	5
1.	Wholesale Services and Facilities	7
2.	Local Number Portability	11
3.	Collocation	13
C.	A Combined Qwest/USWC Will Have An Increased Opportunity to Engage In Discriminatory Conduct and Self-Dealing Both In and Out of Region	14
III.	COMMISSION MUST ADOPT CONDITIONS TO PROTECT THE PUBLIC INTEREST IF MERGER IS TO GO FORWARD.....	15
A.	Qwest/USWC Must Completely Divest All InterLATA Activities Prior to Commission Approval of Proposed Merger.....	16
B.	The Commission should require Qwest and USWC to Agree to a Complete Structural Separation of the Merged Entity into Wholesale and Retail Units	18
C.	The Commission must Require Qwest and USWC to Provide Nondiscriminatory and Adequate Interconnection and Network Elements to Requesting Telecommunications Carriers	20
1.	Qwest/USWC Should Commit to Full and Immediate Compliance with the Commission's UNE Order in Response to the Supreme Court's Remand.....	20
2.	Qwest/USWC Should Commit to Independent Third Party Testing of its Operations Support Systems (OSS) and Competitively Neutral Cost-Recovery.....	21

3.	A Combined Qwest/USWC Should Commit to Report and Meet A Comprehensive Set of Performance Measures and Standards Subject to Substantial Remedies for Qwest/USWC Failure to Adequately Perform.....	24
D.	The Commission Should Impose Other Commitments Designed to Ensure that USWC's Monopoly In-Region Markets Are More Rapidly Opened Up To Competition For Advanced Services	26
E.	USWC and Qwest Should Provide Inter-State Section 252(I) Adoption Rights Across Their Entire Fourteen (14) State In- Region Territory.....	27
IV.	CONCLUSION	32

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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**JOINT COMMENTS OF NEXTLINK COMMUNICATIONS, INC.,
ADVANCED TELCOM GROUP, INC., GST TELECOMMUNICATIONS, INC., and
FIRSTWORLD COMMUNICATIONS, INC.**

NEXTLINK Communications, Inc. (“NEXTLINK”), Advanced TelCom Group, Inc. (“ATG”), GST Telecommunications, Inc. (“GST”), and FirstWorld Communications, Inc. (“FirstWorld”) (collectively “Joint Commenters”) pursuant to Public Notice DA 99-1, released September 1, 1999, hereby submit their comments on the proposed merger and transfer of control between Qwest Communications International, Inc. (“Qwest”) and U S WEST, Inc. (“USWC”) (collectively “Qwest/USWC” or the “Applicants”).¹

NEXTLINK builds and operates high-capacity, fiber-optic and wireless networks to provide local, long distance, data and enhanced telecommunications services.² NEXTLINK currently operates twenty-eight (28) facilities-based networks in forty-five (45) markets located in

¹ See Merger of Qwest Communications International, Inc., and U S WEST, Inc., Applications for Transfer of Control (August 19, 1999) (“Qwest/USWC Joint Application”).

² NEXTLINK is developing a national fiber and fixed wireless network to offer end-to-end voice and broadband data communications over ATM or IP and frame-relay managed facilities.

sixteen (16) states, including USWC states.³ ATG is an integrated communications provider that develops and operates high-capacity fiber-optic networks to provide local, long distance, data and enhanced telecommunications and Internet services. ATG currently provides services in three (3) states, including Washington and Oregon.⁴ GST provides a broad range of integrated telecommunications products and services including enhanced data, Internet and voice services throughout the United States.⁵ FirstWorld is an end-to-end Internet solutions and telecommunications provider. FirstWorld offers a complete range of Internet, Web Integration, consulting, and telephony solutions in three states, including Colorado and Oregon.⁶ All of the Joint Commenters are actively providing service in USWC in-region markets and have experienced anti-competitive conduct in their dealing with USWC, including abysmal service quality and lack of available essential facilities. As competitive local exchange carriers (“CLECs”) that must interconnect and compete with USWC, the Joint Commenters have a strong interest in the outcome of the Commission’s review of the proposed merger.

I. INTRODUCTION.

The proposed merger of Qwest and USWC will have a dramatic and substantial negative impact on competition in the USWC in-region states. This proposed transaction raises serious

³ NEXTLINK provides services in competition with U S WEST in Utah, Colorado, and Washington. See <http://www.nextlink.com/usmap.html>.

⁴ ATG is certificated in WA, OR, ID, CO, CA, NV, TX, MI, and VA and its application is under consideration in CT and MD. ATG currently provides service in WA, OR, and CA and is building networks in NV, MD and VA.

⁵ GST provides facilities-based services throughout the western United States.

⁶ FirstWorld is certificated in California, Oregon, Texas, and Washington, and its application for certification is pending in Utah. FirstWorld currently provides service in California, Colorado, and Oregon.

questions that cannot be swept aside merely because it does not fit the mold of previous anti-competitive mergers by incumbent local exchange carriers (“ILECs”) considered by the Commission. The merger reduces actual and potential competition in the USWC region. The merger raises significant issues for the continued development of local competition in the USWC region for both basic and advanced services that the Commission must address if the merger is to go forward. The merger also increases the ability of a combined Qwest/USWC to engage in preferential self-dealing and other discriminatory activity. The Commission, therefore, should condition any merger approval on specific commitments designed to ensure that Qwest and USWC live up to their current public statements and that promote and protect the public interest once a merger is completed.

These conditions should include a full and detailed commitment by Qwest/USWC to completely divest all businesses prohibited by Section 271 and immediately cease any marketing activities for interLATA in-region services. Qwest/USWC should also agree to a structural separation of their wholesale and retail activities. The Applicants should agree to full compliance with the Commission’s local competition regulations including: (1) an immediate implementation of the Commission’s recent Order on network elements; (2) a demonstration of nondiscriminatory OSS access; (3) performance measures, standards and remedies designed to provide the Commission, state commissions and the public sufficient information to ensure continued Qwest/USWC compliance with those regulations; and (4) full compliance with the Commission’s regulations for the provision of advanced services. Finally, the Commission should require Qwest/USWC to provide region-wide adoption of interconnection terms and conditions in order to avoid unnecessary litigation and speed competitive entry throughout USWC’s region.

II. THE PROPOSED MERGER DOES NOTHING TO BENEFIT CURRENT USWC CUSTOMERS AND DOES NOT PROVIDE A PUBLIC INTEREST BENEFIT.

A. The Merger Of Qwest And USWC Reduces The Amount Of Potential Competition In The USWC Region.

The proposed merger will eliminate competition between USWC and Qwest, both facilities-based providers of telecommunications services in the USWC states. Although the Applicants state that there is “no material overlap” between them, there is no question that Qwest has built a national network with significant facilities in place in the USWC region.⁷ The Commission should examine in great detail the extent and degree of actual and potential competition between Qwest and USWC in those markets where both Applicants have network facilities in place.

Qwest implies that as an interexchange carrier it has little to no overlap with USWC because it is currently prohibited from providing interLATA services, but there is already some overlap in the services provided by the two carriers, and there is significant potential competition in USWC’s current markets. For example, currently Qwest competes with USWC in the provision of interexchange, intraLATA services in several USWC markets and absent USWC’s failure to meet the requirements of Section 271, USWC and Qwest would be competing in every aspect of the interexchange market.

As a carrier with an extensive facilities-based network in place in the USWC region, Qwest is well-positioned to be a major competitor to USWC in the provision of local, advanced,

⁷ Qwest/USWC Joint Application at 12. See Qwest Communications web page at: <http://www.qwest.com/network/mainmaps.html>. Qwest states that it has facilities in place in such USWC markets as Seattle, WA; Portland, OR; Boise, ID; Salt Lake City, UT; Minneapolis, MN; Denver, CO; Phoenix, AZ; and Tucson, AZ. Id.

long distance and bundled services. In the provision of data and advanced services it appears that Qwest and USWC are in direct competition in the provision of service and facilities as both offer digital subscriber line (“xDSL”) services in a number of the same markets. Moreover, Qwest has obtained certification to provide local services in at least three (3) USWC states, Washington, Oregon and Arizona, indicating that Qwest planned to provide local services in those markets. It is unclear from the evidence in the record to date the extent of actual and potential competition between the Applicants, but it is clear that a more extensive review of the facts is required than is suggested by Qwest and USWC in their application to the Commission.

B. The Applicants Have A Poor Record Of Compliance With The Letter And Spirit Of The 1996 Act.

Since the passage of the 1996 Act, USWC has sought to avoid competition in its in-region markets by blocking competition. It has delayed, discriminated and generally obstructed new entrants’ efforts to provide competitive services.⁸ USWC has generally refused to cooperate in good faith with new entrants, forcing interconnection negotiations to arbitration countless times, requiring each individual CLEC to re-litigate each issue in each state. Even more ridiculous, in Arizona, USWC has challenged the state certification of every CLEC seeking to provide service in the state.⁹

⁸ For example, in Washington alone, USWC has arbitrated a total of thirteen (13) interconnection agreements. USWC appealed eight (8) of those arbitration decisions to federal district court. See State of Washington Report to U S WEST Region Oversight Committee, State Issues Update (April 6, 1999). In Oregon, USWC has appealed arbitration decisions with MFS, TCG, AT&T, MCI, and Sprint.

⁹ After USWC lost its challenge to Arizona CLEC certification at the state commission and municipal court level, it appealed to the state supreme court. That consolidated appeal is still pending.

USWC has made minimal efforts to comply with the competitive checklist as reflected by USWC's failure to obtain a determination by any state commission that it is in compliance with Section 271.¹⁰ Perhaps that is not surprising considering USWC's and Qwest's attempt to nullify the practical effect of the interLATA restriction in Section 271 through a prohibited joint provision of interLATA services.¹¹ Qwest, in fact, was actively engaged in two efforts to sidestep Section 271, joining with both USWC and Ameritech to provide in-region interLATA services despite the statutory prohibition. Moreover, USWC has repeatedly challenged both the provisions of the Act and the Commission's implementing regulations.¹² Qwest and USWC now

¹⁰ USWC has applied for a determination of 271 compliance in at least five states: Arizona, Nebraska, New Mexico, Montana, and Wyoming, but withdrawn its application in three of those states and failed to win approval in the other. Moreover, USWC has challenged the constitutionality of Section 271 as well as the Commission's Order concerning Ameritech's application for interLATA authority in Michigan.

¹¹ See AT&T Corp., et al., Complainants, v. Ameritech Corp., Defendant, and Qwest Communications Corp., Defendant-Intervenor; AT&T Corp., et al., Complainants, v. U S WEST Communications, Inc., Defendant, and Qwest Communications Corp., Defendant-Intervenor, Memorandum Opinion and Order, 13 CR 983, 1998 FCC LEXIS 5192 (rel. September 28, 1998). Qwest was also involved in a similar effort by Ameritech to circumvent the interLATA prohibition in Section 271.

¹² See, e.g., Petition of U S WEST Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Memorandum Opinion & Order, CC Docket No. 97-172 (rel. September 27, 1999); SBC Communications, Inc., et al., Plaintiffs, v. Federal Communications Commission, Defendants, Memorandum Opinion and Order, 10 CR 571 (N.D. Tex. Dec. 31, 1997) (USWC participated as a Plaintiff-Intervenor); Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, Order, 12 FCC Rcd 4738 (1997); Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced

state that the proposed merger would redouble USWC's motivations for complying with Section 271.¹³ The extent of the Applicants' prior disregard of the 1996 Act and the Commission's regulations casts significant doubt on their current promises to fully open USWC's markets to competition and take steps to improve their compliance with the law. There is no reason to believe that a merged Qwest/USWC would undertake these obligations, particularly in regards to Section 271, any more seriously than the two companies have individually.

1. Wholesale Services and Facilities

USWC's continuing inability to provide adequate wholesale carrier services and facilities to new entrants is a significant barrier to sustainable competition. This is no surprise considering USWC's parallel behavior in poorly serving its retail customers. USWC has been subject to state commission investigation¹⁴ and carrier complaints¹⁵ due to USWC's refusal to provide interconnection and network facilities, including network elements, as it is required to do under federal and state law. USWC has significantly under-invested in its network resulting in poor

Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. Sec. 160 for ADSL Infrastructure and Service, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 CR 1, 63 FR 45134, 63 FR 45140, 1998 FCC LEXIS 4127 (rel. August 7, 1998) ("Advanced Services MO&O") (USWC petitioned Commission to eliminate LATA boundaries for "advanced" services prior to USWC compliance with Section 271).

¹³ See Qwest/USWC Joint Application at 17; Qwest and USWC web pages on merger: <http://www.qwest.com/merger/index.html>; <http://www.uswest.com/merger/index.html>.

¹⁴ See e.g., Washington Utilities and Transportation Commission, Complainant v. U S WEST Communications, Inc., Respondent, Fifteen Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions, Docket No. UT-950200 (April 11, 1996).

¹⁵ See MCI v. U S WEST Communications, Washington Utilities and Transportation Commission, Docket No. UT-97-1063 (The WUTC concluded that USWC was not providing interconnection facilities as it was required to do.).

service to end users and competitors alike.¹⁶ Electric Lightwave, Inc. (“ELI”), in fact, was forced by USWC’s anti-competitive activity to resort to filing an antitrust suit against USWC in Washington state.¹⁷

USWC has been repeatedly fined and sanctioned by state commissions for poor service quality and a failure to invest in its incumbent networks.¹⁸ For example, the Oregon Public Utility

¹⁶ See, e.g., In the Matter of the Investigation of the Telecommunications Services Provided By U S WEST Communications, Inc. to Mercy Medical Center, Roseburg, Oregon, and the Status of its 1AESS Switches Operating in Oregon, Order, UM 928, Oregon Public Utility Commission (June 28, 1999); “Expedited Complaint Process Ends in Roseburg,” News Release, Oregon Public Utility Commission (rel. September 24, 1999) (“[USWC] has failed to upgrade the Roseburg analog switch or replace it with a new switch with greater capacity and customer problems were pervasive.” “During the height of the Roseburg problems, the [complaint] process addressed more than 60 complaints a day from customers frequently unable to make or receive phone calls.”).

¹⁷ Although that suit has been settled, the fact that it was filed at all is indicative of the extent of USWC’s anti-competitive activity. Moreover, USWC has continued its refusal to pay ELI compensation due for ELI’s transport and termination of traffic to Internet Service Providers. See Electric Lightwave, Inc., Complainant, v. U S West Communications, Inc., Respondent, Oregon Docket No. UC 377 (filed November 13, 1998); Complaint Against US WEST Communications, Inc., by Electric Lightwave, Inc., Requesting the Utah Public Service Commission Enforce An Interconnection Agreement Between Electric Lightwave, Inc., and US WEST Communications, Inc., Order, Public Service Commission of Utah, Docket No. 98-049-36 (January 22, 1999).

¹⁸ See e.g., Matter of the Petition of Pacific Northwest Bell Telephone Company dba U S WEST Communications, Inc., to Price List Telecommunications Services Other than Essential Local Exchange Services, Disposition: Stipulation Terminating Alternative Form of Regulation (AFOR) Adopted, Oregon Public Utility Commission, UT 80 (rel. April 24, 1999) (“Oregon Alternative Regulation Termination Order”); State of Washington Report to U S WEST Region Oversight Committee, State Issues Update (April 6, 1999) (“There have been periodic dramatic increases in subscriber complaints during 1998.”); Oregon state commission Docket No. UT 125 (The Oregon state commission imposed a \$9.9 million fine on U S WEST for poor service in the form of a downward revenue requirement adjustment). The Colorado state commission has opened its second service quality investigation of USWC in five years. The last investigation in 1994 led to a settlement that resulted in \$5.3 million in reparations against the company for PUC rule violations from 1993 to 1995. See Colorado PUC Connections Newsletter at web page: http://www.dora.state.co.us/puc/NEWS/CONNECTS/9-99cnt.htm#Probe_USWC/. (“The PUC decided on July 23 to proceed with its ‘show cause’ investigation into possible violations of Commission rules by U S West concerning repair response time, the number of allowable

Commission opened an investigation this year into USWC's failure to properly budget for network construction and USWC's failure even to complete those projects that it reported to the Oregon commission.¹⁹ The Oregon commission also terminated USWC's alternative regulation plan because USWC was in violation of the service quality standards adopted in the alternative regulation plan.²⁰ The fact that USWC has consistently failed to adequately invest in its network has been clear for some time now. Since the passage of the 1996 Act and federal and state efforts to introduce competition, however, the problems have only been exacerbated by USWC's selective under-investment in facilities necessary for new entrants to compete with USWC.

USWC has failed to provide adequate transport and loop facilities to competitors since the passage of the 1996 Act, and there is no reason to believe without firm commitments to alleviate the problems that they will soon be resolved.²¹ CLECs have had consistent problems obtaining

customer trouble reports, the provision of timely service and the speed of answering calls to the company's business offices."'). Recently, the New Mexico state commission was reported to be considering launching an investigation into USWC due to the high level of consumer complaints. See U S WEST faces state government fire, by John Borland, CNET website (September 20, 1999) at <http://news.cnet.com/news/0-1004-200-121617.html?dd.ne.txt.0921.07>.

¹⁹ Investigation into U S WEST Communications, Inc.'s Construction Budgets, Order, Oregon Public Utility Commission, UM 930 (rel. April 7, 1999) ("Staff noted that at least \$4 million worth of projects had been left undone. Had the projects been completed, Staff believes that the service problems reported by customers along the route between Pendleton and Baker City and in Oakridge would not have occurred."').

²⁰ See Oregon Alternative Regulation Termination Order, Oregon Public Utility Commission, Docket UT 80, Order No. 96-107 (April 24, 1996). In fact, USWC was so delinquent in providing basic telephone services to consumers that the Oregon commission was compelled to require USWC to establish a "cellular loaner" program in order to ensure that citizens could get service prior to receiving wireline service from USWC. Id.

²¹ See, e.g., "Commission Orders U S WEST to Track T-1 Installations," News Release, Oregon Public Utility Commission (rel. September 23, 1999) ("Comments from public meetings held by OPUC around the state indicate a universal service problem with the [USWC's] installations of T-1 service. Customers voiced concerns about unrealistic delays in obtaining T-1 service and sometimes the outright refusal of U S WEST to provide the service."').

transport, loop and access facilities from USWC. For example, since roughly the end of the first quarter of 1999, USWC has told CLECs that it no longer has any capacity for most requested transport and special access facilities in the Phoenix market. Considering that USWC has trumpeted Phoenix as a highly competitive market for some time now,²² it is blatantly anti-competitive for USWC to turn around and deny essential facilities to CLECs in that market. The Joint Commenters have reason to believe that this “capacity limit” exists only for USWC’s competitors as CLECs have experienced numerous instances where CLECs have signed up customers; however, due to USWC “capacity limits” and its refusal to provision requested circuits, those CLECs have been unable to provide service immediately and the customer has, in frustration, ordered the same service from USWC and received service immediately.

Moreover, USWC’s lack of capacity throughout its network has a dramatic impact on CLECs’ quality of service because CLECs are not able to add adequate trunking to and from USWC’s tandem offices where most CLEC inter-network interconnections are made. The lack of adequate trunking results in blockage for CLEC customers in their communications with customers on the USWC network and often other networks interconnected to the USWC network. In addition, the lack of facilities precludes CLECs from providing service to customers where there are no essential facilities available to provide service. The failure of USWC to respond appropriately to CLEC concerns regarding these issues and USWC’s continuing refusal to invest in sufficient facilities to provide nondiscriminatory interconnection is devastating to competition.

²² See Petition of U S WEST Communications, Inc. For Forbearance From Regulation as a Dominant Carrier in Phoenix, Arizona MSA, filed with the FCC, CC Docket No. 98-157 (filed March 5, 1998) (“U S WEST Phoenix Petition”).

The Commission should not view Qwest as a savior to USWC's anti-competitive conduct or service problems. Qwest also has had service problems. For example, ATG has received poor service from Qwest, encountering capacity restraints on Qwest's current network that have resulted in service outages to ATG's network and delays in ATG's ability to provide services between its cities.²³ Moreover, despite the Applicants statements that they will increase investment in traditional phone service after the merger is complete, Qwest and USWC have been quite clear that they view this merger as a means to invest more money into data services, not to improve the provision of basic POTS services to retail customers and essential facilities to wholesale customers.²⁴ Rather than put more resources into addressing USWC's underlying network deficiencies, it is more likely that a merged Qwest/USWC will focus on shifting investment away from essential local services and facilities and redirecting such capital to data services, if left to their own devices.

2. Local Number Portability.

In the same vein, USWC has created substantial problems for CLECs with the implementation of permanent local number portability ("LNP") due to USWC's poor record of service and inability to adequately perform activity necessary to successfully port customers

²³ ATG has used the Qwest network for service between its Salem Oregon and Eugene Oregon networks and between its Tacoma Washington and Olympia Washington networks.

²⁴ See, e.g., In re Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Networks, Inc., and U S WEST Communications, Inc., Washington Utils. & Transp. Comm'n Docket No. UT-991358, Joint Application for Merger of Qwest Communications International, Inc., and U S WEST, Inc. (Aug. 31, 1999) (promising that "the proposed merger will cause no adverse impact" on service quality but identifying anticipated customer benefits only as "significantly greater ability and incentive to accelerate local broadband connectivity for consumers").

without interruption or degradation of service. Consistent with other areas of USWC's wholesale performance, USWC has failed to invest the resources necessary to comply with the requirements of the Act, federal and industry LNP guidelines. USWC's performance has been so bad that GST has suffered from USWC mistakes on approximately one-third (1/3) of its LNP orders sent to USWC this year.²⁵ USWC's failure to provide reliable LNP services has severely affected GST customers in Albuquerque, Phoenix, Portland, Tucson, Spokane and Boise and caused GST to lose customers and additional business. Other carriers have experienced equally poor performance across the entire USWC region.

USWC continues to improperly perform the functions necessary for a seamless cut-over of customers from USWC to CLECs. CLECs have encountered problems with USWC: (1) porting numbers too early in the cut-over process; (2) porting numbers too late in the cut-over process; (3) performing incorrectly the necessary switch translations; and (4) failing to properly set the ten (10) digit trigger. USWC's failure to do so is discriminatory to CLECs, and serves to not only damage USWC's competitors but competition itself. The loss of service and degradation of service quality suffered during the cut-over process by even the limited number of customers now choosing alternate carriers is having an exponentially harmful impact on the viability of competition itself in the USWC region by creating a climate of fear and mistrust among consumers.

Moreover, USWC has failed to perform as the default carrier in the LNP process as required by federal regulations. For example, in Spokane, GST's customers could not receive

²⁵ See Letter from Eric J. Branfman, Outside Counsel for GST Telecommunications, Inc., to Frank G. Lamancusa, Chief, Accelerated Complaint Resolution Branch, Common Carrier Bureau

calls when USWC failed to perform default queries for incoming interexchange calls. Although USWC fixed this particular problem based on GST's recommendation, USWC has not committed the resources and attention necessary to insure that similar problems will not continue to occur. This is just one more example of USWC's consistent pattern of anti-competitive behavior and inadequate performance.

3. Collocation.

USWC has also created significant delays and obstacles to CLEC competitive entry through USWC's efforts to make collocation as uneconomical and impractical as possible for CLECs. Not only has USWC failed to provide collocation arrangements in predictable and reasonable intervals, in many cases it has refused to make collocation available at all.

For example, CLECs have encountered tremendous difficulty obtaining collocation space in several Seattle metropolitan area central offices due to USWC's claims that those offices had space limitations. Beginning in June 1996, several competitors requested physical collocation space in a number of USWC central offices serving the Seattle, Washington metropolitan area. . USWC denied requests for five such central offices, contending that physical collocation in these offices was not practical because of space limitations, and refused to permit the competitors to tour the affected offices. By September 1998, the parties had resolved physical collocation issues in all but the Bellevue Glencourt central office.²⁶ At that time, the Washington Utilities and Transportation Commission in a consolidated complaint case filed by a number of competitors

(August 26, 1999).

²⁶ See In re MFS Communications Company, Inc. Petition for Arbitration of the Interconnection Rates, Terms and Conditions with US WEST Communications, Inc., TCG Seattle Petition For Arbitration, and Interconnection Agreement between Electric Lightwave, Inc. and US WEST Communications, Inc., Washington Utilities and Transportation Commission Decision and Final

ordered USWC to reclaim space by removing obsolete and unused or underutilized equipment. USWC subsequently identified space where it could offer cageless collocation in the Bellevue Glencourt office. However, to date, [cite]NEXTLINK and other CLECs have been unable to complete collocation in the Glencourt office due to a lack of a sufficient USWC power supply. USWC currently claims its augmentation of such power supply will not be complete until December 1999 at the earliest.

Even now after the Commission's clear order spelling out in explicit detail the terms and conditions under which USWC must make collocation available to CLECs, USWC continues its course of ineptitude and non-cooperation.²⁷

C. A Combined Qwest/USWC Will Have An Increased Opportunity to Engage In Discriminatory Conduct and Self-Dealing Both In and Out of Region.

As the monopoly provider of service, USWC has great opportunity to discriminate against its rivals by providing itself with more favorable terms and conditions for service availability and quality. A merged USWC and Qwest, combining two of the facilities-based providers in USWC's in-region territory, will strengthen the merged firm's ability to discriminate against its rivals. Moreover, the combined firm will have significant opportunity to cross-subsidize its aggressive entry into advanced services through revenues obtained from its regulated monopoly basic services. A combined Qwest/USWC should not be allowed to fuel its expansion plans on the backs of USWC's captive ratepayers by siphoning off local monopoly revenues to subsidize and pay for the provision of advanced services or fund its entry into other parts of the country.

Order, Docket Nos. UT-960323, UT-960326, and UT-960337 (September 11, 1998).

²⁷ See, e.g., In the Matter of Telecommunications Collocation Rulemaking, Washington Utilities and Transportation Commission, Docket No. UT-990582, Commission Pre-proposal Statement

In addition, a combined Qwest/USWC will have an increased incentive and opportunity to discriminate in favor of its own retail operations versus its competitors. The loss of Qwest as a facilities-based provider of services will lead to less competition in those USWC markets where Qwest had a network presence. The Commission itself has concluded that facilities-based alternatives are a key piece of the competition puzzle.²⁸ The elimination of Qwest as an independent actor from those markets will give a combined Qwest/USWC an even more dominant position from which to discriminate against rivals through favorable treatment to itself and selective investment in its network to limit its competitors growth and ability to provide service. The Qwest/USWC combination provides no benefit to current USWC ratepayers: it does not provide them with increased competition, it does nothing to enhance USWC's ability to provide them with better service and it creates increased incentives for USWC to continue to migrate capital out of its in-region network and into new ventures out-of-region. Qwest/USWC should not be permitted to invest in broadband services to be provided elsewhere before they are adequately delivering basic local services at home.

III. COMMISSION MUST ADOPT CONDITIONS TO PROTECT THE PUBLIC INTEREST IF THE MERGER IS TO GO FORWARD.

of Inquiry, CR-101 (May 18, 1999) (launching rulemaking into need for collocation rules).

²⁸ See In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (rel. July 7, 1999) ("Building Access NPRM") at paras. 4-5. ("[W]e believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.") Id.

If the Commission does consider approval of the proposed merger, the Commission should not do so without imposing certain conditions designed to protect against the many public interest harms discussed above and to ensure that the Applicants will live up to their pre-merger statements if the proposed merger is approved.

A. Qwest/USWC Must Completely Divest All InterLATA Activities Prior to Commission Approval of Proposed Merger.

Qwest and USWC begrudgingly accept that Qwest should probably divest itself of its retail interLATA accounts prior to approval of its proposed merger with USWC.²⁹ There is no doubt that the 1996 Act requires this, as USWC has not obtained approval in any of its fourteen (14) in-region states and a merged Qwest/USWC would be a successor or assign of USWC under the Act.³⁰ Although Qwest states that it will divest all interLATA services prior to merger closing, it also states that it “is in the process of identifying affected services and making arrangements for third party carriers to assume those service obligations.”³¹ It is unclear, therefore, what services Qwest and USWC believe that Qwest will have to divest prior to consummation of the proposed merger in order to come into compliance with the interLATA restrictions on USWC that will be equally applicable to a combined Qwest/USWC. Clearly the Commission should require Qwest and USWC to be more explicit about their plans for divestiture

²⁹ “The parties believe so strongly in that vision that Qwest is willing to take the difficult step of divesting all of its in-region interLATA services prior to the merger closing.” See Qwest/USWC Joint Application at 3.

³⁰ See 47 USC Section 153(4)(B).

³¹ Qwest/USWC Joint Application at 11.

and allow for interested parties to comment on those plans in order to ensure that such divestiture fully complies with the 1996 Act and is in the public interest.

Although, the Joint Commenters do not know the full extent of Qwest's plans for divestiture,³² the Commission must require full divestiture of interLATA services, including carrier-to-end user services and carrier-to-carrier services. The Commission should not permit Qwest to divest only its end user long distance business, and continue to provide interLATA wholesale voice and data services to numerous carriers as it presently does.³³ Qwest's provision of facilities and capacity across LATA boundaries to other carriers constitutes interLATA services that USWC, prior to Commission approval, may not engage in. Qwest, therefore, must not only transfer end user accounts for interLATA services to another carrier or carriers, but it must find a way to restructure or divest the facilities and capacity it provides on an interLATA basis to other carriers.

Such divestiture is clearly required by the plain language of Section 271. Any exception for USWC in the form of a merger with Qwest would severely undermine Section 271 and the entire legislative scheme to use interLATA authority to encourage the BOCs to open up their monopoly local markets to competition.

The Joint Commenters, therefore, urge the Commission to require Qwest and USWC to fully divest all interLATA services. The Commission should also require the Applicants to

³² See Qwest/USWC Joint Application at 13-14 ("Approval of this merger also is simplified by the fact that Qwest is committed to divest all of its services that otherwise would violate Section 271.")

³³ See Qwest/USWC Joint Application at 6 ("In addition, directly and indirectly through wholly owned subsidiaries, Qwest constructs, sells and sometimes maintains fiber optic communications systems for other telecommunications carriers."); Qwest Communications – Network web page: <http://www.qwest.com/network/mainmaps.html>.

provide explicit detailed plans for such divestiture prior to approval of the merger and allow for public comment. Finally, the Commission must require all divestiture to be completed prior to any Commission approval of the proposed merger.

B. The Commission should require Qwest and USWC to Agree to a Complete Structural Separation of the Merged Entity into Wholesale and Retail Units.

If the Commission allows the proposed merger to go forward, the Commission should do so only if, as a condition of the merger, the companies agree to a complete structural separation of wholesale and retail activities into two separate operations. As discussed above, one of the chief threats to the public interest from this proposed merger is the ability of Qwest/USWC to continue to frustrate competition in its in-region markets and then exploit that monopoly revenue stream to subsidize both in and out-of-region activities. A complete separation of wholesale and retail operations serves to protect in-region competition by forcing the Qwest/USWC retail operation to compete on the same basis as new entrants, and it would separate those near-monopoly wholesale network operations from any out-of-region retail competitive activities.

Qwest and USWC have stated that their merger will be pro-competitive and improve their ability to provide services in-region to retail and wholesale customers alike. If the Applicants are serious about these statements, a commitment to structural separation between their wholesale and retail operations would demonstrate their willingness to improve the overall quality of their network services and to provide nondiscriminatory treatment to competing carriers vis a vis their retail operations. Moreover, a clear separation between wholesale and retail functions would allow the Commission and state commissions a transparent means to monitor and enforce the merged entity's compliance with its obligations.

The Commission must structure this condition to require a strict separation between the wholesale and retail functions. The Qwest/USWC retail operations must obtain any and all services from the Qwest/UWSC wholesale operations through tariffs or publicly filed contracts and on the same basis, using the same systems, as other CLECs may obtain services, products and other arrangements from the Qwest/USWC wholesale operations. Structural separation would be the most effective means to ensure that the merged Qwest/USWC does not abuse its monopoly in-region position and that there is a level playing field for competition.

Although the Commission, in the context of a merger proceeding, has not previously required an ILEC to structurally separate its operations into wholesale and retail entities, the Commission has ample authority to require such a condition as the most efficient means to protect and promote the public interest at stake. In addition, some state commissions have already taken such a step in order to facilitate the development of local competition.³⁴ Moreover, USWC is already required by the 1996 Act to provide certain services through a structurally separate affiliate.³⁵ The Commission itself has already recognized the public interest benefits of separation

³⁴ See, e.g., Joint Petition of Senators Fumo, Madigan, and White, The Pennsylvania Cable & Telecommunications Assn., and Seven Competitive Local Exchange Carriers for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, Joint Motion of Chairman Quain and Commissioners Rolka, Brownwell & Wilson, P-00991648, Pennsylvania Public Utility Commission (August 26, 1999) (“Pennsylvania Global Settlement Order”); DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83, Decision, State of Connecticut, Department of Public Utility Control, Docket No. 94-10-05 (June 25, 1997).

³⁵ Those services are: (1) manufacturing activities, as defined in section 273(h) of the Act; (2) origination of interLATA services other than incidental interLATA services, out of region services, or previously authorized activities (each as defined in the Act); and, (3) interLATA information services other than electronic publishing and alarm monitoring services (both as defined in the Act).

in its approval of separate advanced services affiliates for incumbent local exchange carriers ("ILECs.")³⁶

Accordingly, the Commission should require as a condition of the merger for Qwest and USWC to submit a plan to separate their wholesale and retail operations at least sixty (60) days prior to the merger in order to provide the Commission with sufficient time to receive public comment and review the proposal. This plan should spell out in detail how Qwest/USWC would create a separate affiliate for the provision of all retail services that will operate independently from the Qwest/USWC wholesale operations. The plan should at a minimum meet structural and transactional requirements similar to those required by the 1996 Act for a separate affiliate for long distance services. In addition, it should identify what aspects of retail service will be structurally separate and their related costs.

C. The Commission Must Require Qwest and USWC to Provide Nondiscriminatory and Adequate Interconnection and Network Elements to Requesting Telecommunications Carriers.

1. Qwest/USWC Should Commit to Full and Immediate Compliance with the Commission's UNE Order in Response to the Supreme Court's Remand.

As discussed above, USWC has flagrantly failed to comply with its obligations under Section 251 of the Act for the past three plus years, let alone seek to apply for interLATA authority under Section 271 of the Act. Through its failure to seek authority to provide interLATA services under Section 271 USWC has avoided much of the state and federal scrutiny

³⁶ See FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements, News Release, (rel. September 15, 1999) ("UNE Remand Press Release") at website: http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrcc9066.html; Advanced Services MO&O.

of its compliance (or lack thereof) with its incumbent obligation under the 1996 Act that other BOCs have been subjected to in the past three years.³⁷

The Commission has recently adopted its Order determining which unbundled network elements ILEC are required to provide in response to the Remand from the Supreme Court.³⁸ Qwest/USWC should commit as a condition of approval of their merger not to challenge or otherwise appeal the Commission order and furthermore to fully implement it as expeditiously as possible. The Applicants should be required to present their plans to implement the Commission order within thirty (30) days of the release of the Commission's Order, subject to review by the Commission. Once the Commission has approved these implementation plans, they will serve as a "floor" for further negotiations between requesting carriers and Qwest/USWC. The existence of this "floor" shall expedite negotiations and state commission review by eliminating any efforts by Qwest/USWC to seek to provide CLECs with less than is required by federal law under Section 251 and 252. Once USWC's in-region local markets are fully opened to competitive entry, the Commission could expect that the entry and expansion of CLEC service offerings would eventually provide a competitive check on USWC's ability to exploit its customers.

2. Qwest/USWC Should Commit to Independent Third Party Testing of its Operations Support Systems (OSS) and Competitively Neutral Cost-Recovery.

The Applicants should commit to an independent third party test of their OSS systems that would be designed to demonstrate that those OSS systems are capable of providing CLECs with

³⁷ See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order, 12 FCC Rcd 20543 (rel. Aug. 19, 1997).

³⁸ See UNE Remand Press Release.

nondiscriminatory access to Qwest/USWC's OSS functions. The Arizona state commission is currently working with USWC to conduct an as yet undefined test that purports to be based on the Texas state commission's recent test of SBC's OSS systems.³⁹ USWC also is beginning to work with its thirteen other state commissions collectively to arrange a third-party test of its OSS systems.⁴⁰ The Joint Commenters urge the Commission to require the post-merger Qwest/USWC to commit to comply as expeditiously as possible with a third-party OSS test that fully satisfies the Commission's standards for the nondiscriminatory provision of OSS access in order to ensure that the post-merger company's wholesale operations can provide necessary network elements and services on an adequate and nondiscriminatory basis. Although the Arizona and other state commission proceedings may provide the appropriate vehicle for conducting a third-party test of the OSS systems, it is critical to the success of these tests that they measure whether the OSS systems meet the Commission's standards for OSS access.

In addition to a commitment from Qwest/USWC to subject their OSS systems to independent third-party testing, the Commission should require the Applicants to participate in a collaborative process with CLECs and state commissions in order to make any necessary revisions or upgrades to the current USWC OSS in order to bring them into full compliance with the

³⁹ See Arizona Corporation Commission, Request for Proposal "Participate in a Test of U S WEST's OSS Operational Readiness," (rel. August 27, 1999).

⁴⁰ The Regional Oversight Committee ("ROC") is considering the format and scope of a third-party test for USWC's OSS systems. They are considering both the approach taken in Arizona and the approach taken by the New York state commission in its review of Bell Atlantic's OSS readiness. See generally Petition of New York Telephone for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996; and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of New York, Case 97-C-0271.

Commission's nondiscrimination standards.⁴¹ For example, in New York, the industry has made significant progress towards an acceptable plan for OSS implementation through a collaborative process that includes ILECs, CLECs, and regulators. Since compliance with OSS access has been a significant stumbling block in previous BOC applications for authority under Section 271, this condition would not only promote competition but it would improve Qwest/USWC's efforts to obtain interLATA authority.

In addition, Qwest/USWC should commit not to add separate charges for use of electronic interfaces for accessing critical OSS functions. Costs to develop and implement OSS interfaces and upgrade OSS functions should fall on all carriers in a competitively neutral manner.⁴² In any event, the use of electronic interfaces should be more efficient for all carriers involved, reducing costs from human intervention that would otherwise be involved in less efficient methods such as using facsimiles machines or telephones. It is unreasonable for ILECs to impose additional charges for implementing an overall improvement to the process of obtaining and supporting unbundled network elements ("UNEs") or interconnection. Any such costs to the ILEC should be more than recovered from reduction in the amount of manual intervention and the increased efficiency of the process.

3. A Combined Qwest/USWC Should Commit to Report and Meet A Comprehensive Set of Performance Measures and Standards Subject

⁴¹ For example, in New York, CLECs and Bell Atlantic have made progress towards improving Bell Atlantic's OSS through a collaborative process that includes ILECs, CLECs, and regulators. See New York Commission order on OSS.

⁴² Qwest and USWC, therefore, should agree to a competitively neutral recovery of industry costs for OSS implementation under the cost recovery principles developed by the Commission in its Telephone Number Portability docket. See Telephone Number Portability, Third Report & Order, 13 FCC Rcd 11701, para. 35 (1998).

to Substantial Remedies for Qwest/USWC Failure to Adequately Perform.

The Commission should require Qwest/USWC to commit to a comprehensive set of performance measures, standards and remedies for its carrier to carrier performance.⁴³ The need for adequate and nondiscriminatory wholesale performance is no less important as a condition to this proposed merger than it is to any other similar proposed merger, such as SBC/Ameritech where the Commission has recognized the need for a comprehensive set of performance metrics.⁴⁴ In fact, given USWC's abysmal performance record and the threat that such record will deteriorate even further as a result of the proposed merger, the need for an even more comprehensive set of performance metrics is clear. Qwest/USWC should commit to submit a plan that incorporates the "best practices" of those measurements, standards and remedies adopted by the California, New York, and Pennsylvania state commissions. The Commission should require Qwest/USWC to submit a plan, prior to merger approval, that spells out how Qwest/USWC would implement a "best practices" combination of metrics from California, New York, and Pennsylvania. The Commission could then, after opportunity for public comment, approve or modify the plan as needed to ensure that the post-merger Qwest/USWC provided sufficient

⁴³ The Commission should adopt these performance metrics whether or not it requires a combined Qwest/USWC to separate its wholesale and retail operations. The Commission must still guard against poor performance by even a strictly wholesale Qwest/USWC operation as uniformly inadequate performance will not only hurt competition but continue to injure local consumers who will be deprived of adequate service no matter from which carrier they obtain retail services.

⁴⁴ In addition the Commission has previously recognized the importance of performance measurements in its docket on performance measures. See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Support Services and Directory Assistance, 13 FCC Rcd. 12817 (1998) ("Performance Measures NPRM").

information to the Commission, state commissions and the public to ensure that the Applicants lived up to their public statements and any conditions to their merger approval.

In order to ensure that these performance metrics have their intended effect the Commission must require the Applicants to commit to significant performance remedies for their failure to provide adequate and nondiscriminatory wholesale services as measured by the performance metrics. The Commission should adopt a system of incident-based liquidated damages so that, when Qwest/USWC does not provide adequate service or discriminates against one of its retail operations' rival firms, it must pay material liquidated damages to that rival firm. A system of this type will provide Qwest/USWC with the greatest incentives to comply with its duty to provide adequate wholesale services on a nondiscriminatory basis because its failure to do so will result in an immediate obligation to compensate the damaged party.

Moreover, these performance metrics and remedies must be effective at the time of the approval of the merger. The dangers to competition created by the proposed merger start on day one, and the checks on those dangers cannot be delayed beyond that time. The Commission has sought to rely upon post-merger conditions in its approval of Bell Atlantic's merger with NYNEX. As has been widely discussed, because the Commission did not require Bell Atlantic to conform to proposed conditions prior to its merger with NYNEX, once the merger was completed, the Commission's ability to stop Bell Atlantic from pressing its interpretation of the conditions on CLECs was effectively gone.⁴⁵

⁴⁵ See e.g., Comments of NEXTLINK Communications, Inc., and Cablevision Lightpath, Inc., In the Matter of Bell Atlantic's Progress Report on Compliance With Bell Atlantic/NYNEX Merger Order Conditions, File No. AAD 98-24 (March 8, 1999).

The Joint Commenters, therefore, request that the Commission adopt a complete set of performance measures with realistically significant penalties for noncompliance. This will provide Qwest/USWC with serious incentives to commit to open their markets and, by extension, provide a competitive choice for USWC's captive consumers.

D. The Commission Should Impose Other Commitments Designed to Ensure that USWC's Monopoly In-Region Markets Are More Rapidly Opened Up To Competition For Advanced Services.

The key to ensuring continuing competition for advanced services is providing equal access to necessary facilities and operational functions. The presence of digital loop carrier in the network hinders deployment of xDSL services, since DSL relies on high throughput over copper without load coils or other impediments. DSL services are restricted in deployment based on DSL-capable facilities, e.g., copper, therefore, collocation proximate to customers is required. The Applicants should commit to allowing carriers to collocate at remote terminals and other premises outside of the central office in order to access existing copper facilities.

The merged entity should also provide work-arounds (such as multi-host DSLAMs) and xDSL functionality where a digital loop carrier is present. Similarly, efficient, operable and practical OSS solutions must be provided to allow carriers full access to loop makeup databases. Without full access to the raw data that populates USWC's existing loop makeup databases, competitors are stymied in offering innovative broadband services and instead are limited to mimicking the services that USWC provides.

The arbitrary determinations made by USWC in programming its Loop Facilities Assignment Center database which selects DLC loops instead of unbundled twisted copper pair first for assignment to CLECs, favors USWC and provides for automated flow through and

potentially favorable treatment of USWC's retail DSL service orders. USWC's development of flow through for its own DSL service allows for greater efficiencies and reduced human error, whereas CLEC loop orders are totally manual and handled by various USWC personnel from receipt of order through to installation. Qwest and USWC must commit to provide CLECs with access to OSS functions supporting ordering and provisioning of DSL-capable facilities that is equal to what Qwest/USWC will provide itself after the merger.

E. Qwest and USWC Should Provide Inter-State Section 252(i) Adoption Rights Across Their Entire Fourteen (14) State In-Region Territory.

USWC has consistently failed to adopt pro-competitive solutions to CLEC requests for efficient and/or innovative interconnection and access to network elements. Furthermore, USWC has made CLECs fight for such arrangements over and over again in each and every state in USWC's fourteen (14) state region. The time and expense necessary to negotiate, mediate and arbitrate (as well as the multitude of district court appeals) the same issues in fourteen separate states is not only a tremendous economic burden to new entrants but it delays and often completely precludes CLECs from providing service in competition with USWC.

Even within each individual state, USWC has forced CLECs to re-litigate the same contract provisions that USWC has previously negotiated, mediated or arbitrated with other CLECs. USWC's position on Section 252(i) is that a carrier may opt into provisions of another agreement only if that agreement is approved after a carrier's agreement with USWC is negotiated or arbitrated, and only within six (6) months after the agreement the carrier seeks to opt into was approved.⁴⁶ USWC has further attempted to obstruct CLECs' efforts to adopt

⁴⁶ See NEXTLINK v. U S WEST, Washington Utilities and Transportation Commission, Docket No. UT-990340, Commission Order Adopting Recommended Decision, in Part, and Modifying

provisions of other agreements by claiming that many arbitrated provisions are “carrier-specific” and therefore cannot be offered to other carriers.

This cramped interpretation of the section is far more limited than the Commission’s rule and has adversely impacted CLECs ability to use the provision.⁴⁷ For example, USWC has refused to provide ATG with the terms and conditions on which USWC has agreed to provide cageless collocation to another CLEC in one state, meanwhile allowing ATG access to the more favorable terms and conditions in another. Although the Supreme Court’s recent ruling reinstated the Commission’s unambiguous rule implementing Section 252(i), USWC continues to misinterpret the adoption process contemplated by the 1996 Act and the Commission, and by virtue of its intransigence, USWC eliminates the speed and efficiency of entry.

Furthermore, the loss of Qwest as an alternative supplier of facilities in competition with USWC will diminish the prospects for competition in the USWC region without certain conditions. The Commission has already recognized the need to require ILECs to provide to CLECs “best practices” in the context of collocation arrangements,⁴⁸ and has also discussed with SBC and Ameritech the need to provide such best practices on a broader basis in the context of

Recommended Decision, in Part (Sept. 9, 1999) (USWC stated its position concerning adoption under Section 252(i) on the record in this proceeding).

⁴⁷ In fact, the Commission has already held that “agreements remain available for use by requesting carriers for a reasonable amount of time.” Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd at 16140, para. 1319 (1996) (“First Local Competition Order”), aff’d in part and vacated in part sub nom. Iowa Utilities board v. FCC, No. 96-3321 (U.S. Sup. Ct. Jan. 25, 1999). Local Competition Order, 11 FCC Rcd at 16140, para. 1319. The Commission states that this rule would provide CLECs with “a reasonable time during which they may benefit from previously negotiated agreements.” Id.

⁴⁸ See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (rel. March 31, 1999) (“First Advanced Services Order”) at para. 23.

proposed conditions for those companies' proposed merger.⁴⁹ The Commission should require Qwest/USWC to comply with a similar set of conditions to counteract the public interest harms created by the proposed merger.

Qwest and USWC have asserted publicly and in their application for merger with the FCC that their merger will speed competition in USWC's in-region territory. One of the most significant delays to more widespread competitive entry is the dilatory and arbitrary approach USWC has taken in its approach to negotiation of interconnection agreements with CLECs. Not only has USWC refused to cooperate with carriers seeking to use the adoption process of Section 252(i), USWC has used the state specific nature of Section 252 to force CLECs to obtain the same interconnection arrangements and network elements separately in every individual state in USWC's region. USWC has simply refused to, in good faith, acknowledge the applicability of best practices adopted in one state to any other of its incumbent states without forcing CLECs to engage in the exact same debate over those best practices in each and every state that a CLEC seeks to enter and provide service. USWC's tactics have had the effect of raising CLECs' costs and delaying the impact of CLEC entry on USWC's local markets, to the benefit of USWC and the detriment of local consumers.

Qwest and USWC, therefore, should commit to entering into regional interconnection agreements with CLECs that consist of those best practices of USWC in any one of its states as identified and requested by the CLEC. Such a commitment would significantly reduce the amount of unnecessary administrative and litigation expense that USWC currently inflicts on its potential

⁴⁹ See, e.g., Letter from Richard Hetke, Senior Counsel, Ameritech Corp. and Paul K. Mancini, General Counsel, SBC Communications, Inc. to Magalie Roman Salas, Esq., Secretary, FCC (September 17, 1999).

rivals and would allow carriers and state regulators to focus their limited resources on substantive pro-competitive issues rather than needless duplicative litigation. This commitment should include both those provisions that USWC and Qwest negotiate with other carriers as well as those that are entered into as a result of mediation or arbitration or other regulatory orders. The Commission has previously concluded and continues to receive ample evidence that CLECs do not have bargaining power vis a vis the ILECs.⁵⁰ Only if agreements that reflect state commission (and Commission) involvement are available for region-wide adoption will a Qwest/USWC's commitment to "pick and choose" provide real benefits to CLECs and by extension, consumers.

In addition to the in-region best practices approach discussed above, the Commission should require that Qwest/USWC commit to provide to CLECs any terms and conditions that Qwest/USWC obtains from other ILECs in the course of its out-of-region activities. This commitment should include both those terms and conditions that Qwest obtained from other ILECs prior to the merger and those terms and conditions that Qwest/USWC obtain after the merger. Good faith should require that Qwest/USWC be prepared to offer any terms and conditions they have or are able to obtain from other ILECs to a requesting carrier in USWC's incumbent region.

It is also important that Qwest/USWC make these terms and conditions available to CLECs for adoption for a reasonable time after they initially enter into the original agreement, and CLECs must have access to network elements, interconnection or wholesale services on the basis of those terms and conditions for a reasonable amount of time after their adoption. The Commission has already found that "agreements remain available for use by requesting carriers for

⁵⁰ First Local Competition Order, 11 FCC Rcd at 15570-71, para. 141

a reasonable amount of time.”⁵¹ The Commission found that this rule would provide CLECs with “a reasonable time during which they may benefit from previously negotiated agreements.”⁵² If Section 252(i) is solely governed by the term of the original contract that is subject to adoption there would not have been any need for the Commission to adopt a rule of “reasonableness.”

The Commission also should require Qwest/USWC to commit to comply with the Commission’s order in the Local Competition Order to file all of its interconnection agreements, including those with other ILECs and those negotiated prior to the Telecommunications Act of 1996, with state commissions for inspection and adoption by CLECs. This will facilitate the “best practices” commitment by ensuring that all of USWC’s agreements, including its ILEC-to-ILEC agreements, are available to CLECs.

⁵¹ Local Competition Order, 11 FCC Rcd at 16140, para. 1319.

⁵² Id.

IV. CONCLUSION.

The proposed merger of these two companies provides no evidence that it will promote the public interest, and there is significant evidence that it will significantly harm existing competition and exacerbate USWC's wholesale service deficiencies. The Commission should not consider approval of the merger unless its approval is conditioned upon verifiable commitments from the Applicants as described above that would address the public interest flaws of the proposed merger.

Respectfully submitted,

/s/

R. Gerard Salemm
Senior Vice President
External Affairs and Industry Relations
Daniel Gonzalez
Director of Regulatory Affairs
Alaine Miller
Director of Regulatory & Public Policy
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, NW, Suite 1000
Washington, DC 20036
202.721.0999

Kath Thomas
Vice President
Regulatory and Public Policy
Advanced TelCom Group, Inc.
100 Stony Point Road, Suite 130
Santa Rosa, CA 95401
707.535.8999

Daniel M. Waggoner
Gregory J. Kopta
Robert S. Tanner
Davis Wright Tremaine LLP
1500 K St., N.W., Suite 450
Washington, DC 20005-1262
202.508.6600

Brian D. Thomas
Vice President, External Affairs
Gary Yaquinto
Vice President
Government & Regulatory Affairs
GST Telecommunications, Inc.
4001 Main Street
Vancouver, WA 98663

Victoria T. Aguilar
Senior Director
Regulatory and Government Affairs
FirstWorld Communications, Inc.
8390 East Crescent Parkway, Suite 300

Greenwood Village, CO 80111

Dated: October 1, 1999

CERTIFICATE OF SERVICE

I, Jane Whang, hereby certify that on October 1, 1999, I caused the “Comments of NEXTLINK Communications, Inc., Advanced TelCom Group, Inc., GST Telecommunications, Inc., and FirstWorld Communications, Inc.” to be served by using the Commission’s Electronic Comment Filing System (“ECFS”) in this proceeding.

/s/
Jane Whang